

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| |) | |
| Petition of the Multifamily Broadband Council |) | |
| Seeking Preemption of Article 52 of the |) | MB Docket No. 17-91 |
| San Francisco Police Code |) | |

COMMENTS OF Data Stream, Inc.

I. INTRODUCTION.

Data Stream, Inc. hereby submits its initial comments to the Federal Communications Commission (“FCC” or “Commission”) in response to the April 4, 2017 Public Notice in the above-referenced proceeding. The Commission’s Public Notice seeks input on a petition submitted by the Multifamily Broadband Council (“MBC”). MBC’s petition seeks a declaratory ruling that Article 52 of the San Francisco Police Code is preempted because Article 52 conflicts with the Commission’s regulatory frameworks governing competitive access to inside wiring in multi-tenant buildings, bulk billing arrangements, and forced network sharing obligations, and because federal law and policy have “occupied the field.”

For the reasons described below, the Commission should grant MBC’s petitions.

II. BACKGROUND.

Data Stream, Inc., which was formed in 2016 and is based in Minneapolis, MN is a fiber-based gigabit Internet service provider that provides voice and Internet services to residential multi-tenant properties, in direct competition with larger, well-funded entities. **Data Stream, Inc.** Provides these services to properties in the Minneapolis metropolitan market representing thousands of units. Our services are highly competitive – we offer Internet plans to

our customers ranging from 30 Mbps to 1 Gbps, as well as domestic and international voice service—all at prices at or below that of the major teleco and cable providers.

Although **Data Stream** does not currently provide service in San Francisco, **Data Stream** is compelled to submit these comments on MBC's petitions due to Article 52's clear anticompetitive effect and the negative consequences that would follow if similar laws are adopted in other cities.

III. ARTICLE 52 IMPOSES SEVERE CONSTRAINTS ON THE ABILITY OF COMPETITIVE PROVIDERS TO SERVE MULTI-TENANT BUILDINGS.

As MBC correctly observes, Article 52 distorts the competitive landscape by overriding voluntary, contractual arrangements that are preconditions to the financing required for buildouts in multi-tenant buildings. Unlike large, deep-pocketed corporations like Google, **Data Stream** depends on third-party investors and lenders in order to deploy our facilities on multi-tenant properties. For smaller providers like **Data Stream** who cannot self-fund their operations, such financing is critical given the substantial capital outlay required to construct and launch a system on a multi-tenant property. Simply put, if we unable able to demonstrate a likelihood of success with regard to a particular project, the bank or other lenders will not fund it.

In **Data Stream**'s experience, one of the key indicators of likely success is a valid, enforceable right of entry ("ROE") agreement with a property owner that grants our company protected and undisturbed use of wiring inside the building(s).

Another mechanism that our company has used to secure financing is a bulk billing arrangement, under which the property owner purchases service and provides it as an amenity for all tenants at a steep discount off of regular retail pricing. As the Commission has recognized, bulk billing arrangements allow companies like ours to offer reduced prices to customers by spreading fixed costs among many subscribers using common facilities. However, we are only

able to offer such discounts if we have the ability to serve all (or almost all) of the tenants on a given property.

If allowed to stand, Article 52 and other laws like it would eliminate these sorts of arrangements and make it extremely difficult for smaller competitive providers to obtain financing and compete against better-funded competitors who do not need outside financing. As a result, in many cases smaller competitive service providers like ours will not be able to secure funding to construct an on-site network, and thereby be forced to withdraw from markets with similar laws as Article 52. Further, **Data Stream** has put all plans on hold to launch properties in San Francisco pending the outcome of this petition.

Furthermore, where a smaller competitive provider has successfully negotiated an agreement for exclusive access to the property owner's wiring, Article 52 nullifies that arrangement by mandating that the property owner allow all comers to share his or her wiring. This wire sharing mandate reduces the incentive for companies like ours to invest in upgrading our existing network facilities in multi-tenant properties.

Finally, the FCC's inside wiring rules have played a major role in facilitating competition for communications services in **Data Stream's** service territories. Data Stream utilizes either existing infrastructure cabling/inside wiring, or in some cases puts up the capital to pre/post wire the properties to bring the infrastructure up to specifications to provide gigabit internet services. In some cases, the infrastructure cabling is exclusive to Data Stream being that the capital expense was incurred by the company and not the properties. This ordinance will directly impact the ability for our company to market to property owners who are seeking to bring their older properties into the "Gigabit" era and be competitive in their market with newer facilities.

Accordingly, **Data Stream** shares MBC's concerns that Article 52 will penalize property owners who have taken advantage of the FCC's rules, dissuade other property owners from exercising their rights under the FCC's rules in the first place, and/or incentivize property owners to try and avoid Article 52 by ceding their ownership rights over inside wiring to incumbent providers.

IV. ARTICLE 52 EXACERBATES THE DIGITAL DIVIDE.

As MBC has noted, bulk billing arrangements are typically used by property owners and service providers to provide affordable video and broadband services to shared-living environments like retirement and nursing homes, student housing, and lower- or fixed-income residents.

As noted above, bulk billing arrangements will cease to exist under Article 52. As a result, consumers who depend on such arrangements will likely receive services at higher prices and poor customer service.

V. ARTICLE 52 IMPAIRS THE ABILITY OF COMPETITIVE PROVIDERS TO MAINTAIN A HIGH LEVEL OF CUSTOMER SERVICE.

In **Data Stream's** experience, a significant portion of service interruptions and related problems in multi-tenant properties are caused by issues relating to inside wiring. Because Article 52 does not address how multiple providers on the same property must behave towards each other, the ordinance will only make these problems worse.

Specifically, the use of common wiring for two signals usually results in interference, which leads to service cutoffs and, eventually, loss of customers. Two providers sharing the same unit line to provide services will not only cause more service issues and interruptions, but will ultimately create a "free for all" type environment for their tech base and there will be no network separation.

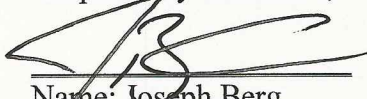
In other instances, service providers have simply disconnected the inside wiring that connects our service to a tenant and reattached that wiring to their own equipment. These situations have aggravated and confused our customers. In some instances, we have lost customers due to other providers cutting cables or network sabotage.

Moreover, **Data Stream** often includes service level agreements ("SLAs") in our agreements with property owners. A typical SLA includes mandatory deadlines for repairing service interruptions and outages, completing installations, and enforceable standards to maintain minimum bandwidth to a property. SLAs are an effective way for our company to distinguish itself from large providers that do not offer service level guarantees. Under Article 52, however, we cannot commit to a SLA because we do not have protected and undisturbed control over the wiring being used to deliver our services to customers.

VI. CONCLUSION.

For the reasons discussed above, the Commission should find that Article 52 is preempted by federal law and policy.

Respectfully submitted,


Name: Joseph Berg
Title: President & CEO

Data Stream Incorporated
12510 Fletcher Lane
Suite K
Rogers, MN 55374

Dated: May 12, 2017